

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:LM:NR:DEN:POSTF-104136-02  
WRDavis

date: **16 MAY 2002**

to: Team Manager, LMSB, Group [REDACTED]

from: Area Counsel  
(Natural Resources:Houston)

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subject: Request for LMSB Division Counsel Assistance:

[REDACTED] Inc. & Subsidiaries (EIN [REDACTED]) - Consent to Extend  
Statute of Limitations for Short Taxable Year ended [REDACTED]  
Address: [REDACTED]  
[REDACTED]

This memorandum responds to your request for assistance seeking our opinion as to the proper parties and language to include on a consent to extend the statute of limitations on assessment for [REDACTED], Inc., and Subsidiaries for the short taxable year beginning on [REDACTED] and ended on [REDACTED]. Pursuant to review, we have made several minor modifications to the memorandum dated May 6, 2002. This memorandum should not be cited as precedent.

**DISCLOSURE STATEMENT**

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

**ISSUES**

1. Consolidated Group Consent: What is the correct wording of a consent to extend the statute of limitations upon assessment of income tax for [REDACTED] Inc. and subsidiaries (taxpayer) for its short taxable year beginning on [REDACTED], and ended on [REDACTED] ([REDACTED] taxable year)?

2. EIN to use on Consent: What is the correct Employer Identification Number to use as the Taxpayer Identification

Number on Form 872-I<sup>1</sup> that extends the assessment and collection statutes for the taxpayer's [REDACTED] taxable year?

### CONCLUSIONS

1. The caption on page 1 of the Form 872-I should read:

[REDACTED] Inc. (EIN [REDACTED]),  
as alternative agent under Treas. Reg. § 1.1502-77T for the  
[REDACTED] Inc. (EIN [REDACTED]) and Subsidiaries  
consolidated group.\*

Put an asterisk after "group." At the bottom of the Form 872-I, include the following language:

\* This is with respect to the consolidated federal income tax of [REDACTED] Inc. (EIN [REDACTED]) and Subsidiaries consolidated group for the group's short taxable year beginning [REDACTED], and ended [REDACTED].

We further remind you that you must notify the taxpayer of its right 1) to refuse to extend the period of limitations, or 2) to limit the extension to a particular issue, or 3) to limit the extension to a particular period of time. Further, it is suggested that you secure consents to extend statutes of limitation by sending Letter 907(DO). In addition, you should provide the taxpayer with Publication 1035.

2. The proper EIN to identify the taxpayer to which the Consent applies is the EIN used on the taxpayer's return for that taxable year (i.e., [REDACTED]).

### FACTS

A consolidated corporate income tax return was filed for [REDACTED] Inc., and Subsidiaries, EIN [REDACTED], for its short taxable year beginning [REDACTED], and ended [REDACTED], in accordance with I.R.C. § 1501 et seq. and the regulations thereunder. The short taxable year came about because the taxpayer and the affiliated group of corporations that filed that consolidated return for [REDACTED] were spun off from [REDACTED] Inc., EIN [REDACTED]. The details of the spin-

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<sup>1</sup> Since at least one of the members of the group was in a TEFRA partnership for that year, we recommend use of the corporate Form 872-I.

off follow. Except as otherwise noted, each of the corporations identified herein was a Delaware corporation.

#### Spin-off of [REDACTED] Group

On [REDACTED], [REDACTED] Inc., EIN [REDACTED] (Old [REDACTED]), separated its [REDACTED] service business from its [REDACTED] business by spinning off the former. This was accomplished through a number of intervening steps, the relevant ones of which are explained herein. First, "[REDACTED]" (a [REDACTED] corporation), the first-tier subsidiary which owned, either directly or through lower-tier subsidiaries, the stock in all [REDACTED]-related corporations within the Old [REDACTED] affiliated group, incorporated a new subsidiary, [REDACTED] Inc. Thereafter, [REDACTED] merged with and into [REDACTED] Inc., with [REDACTED] surviving, and issued to Old [REDACTED] that number of shares of [REDACTED] common stock equal to the number of [REDACTED] common stock of Old [REDACTED] (the tracking stock) then outstanding.

Old [REDACTED] further effected the separation by contributing certain assets, including rights to the name, "[REDACTED]" to [REDACTED]. Immediately thereafter, Old [REDACTED] distributed all of the issued and outstanding capital stock of [REDACTED] Inc., by exchanging each share for one share of [REDACTED] tracking stock held by the Old [REDACTED] stockholders. Prior to the spin-off of [REDACTED] Inc., Old [REDACTED] sought, and received, a private letter ruling determining that this, and other related transactions needed to accomplish this spin-off, constituted a tax-free reorganization described in section 368(a)(1)(F). The details of the particular transactions, and the bases for the tax treatment, are included in Priv. Ltr. Rul. [REDACTED] ([REDACTED]).

As a result thereafter, only holders of the [REDACTED] common stock of Old [REDACTED] (the [REDACTED] tracking stock) owned shares of Old [REDACTED] common stock, inasmuch as the [REDACTED] common stock of Old [REDACTED] was canceled after the exchange for [REDACTED] Inc., stock. Finally, [REDACTED] Inc., was renamed [REDACTED] Inc., EIN [REDACTED] (the taxpayer to which this memorandum applies), and Old [REDACTED] was renamed [REDACTED] Inc., EIN [REDACTED].

#### Merger of Taxpayer into [REDACTED]

On [REDACTED], [REDACTED] Inc., EIN [REDACTED] merged with and into [REDACTED] Inc., EIN [REDACTED] ([REDACTED]), in a statutory merger, a transaction qualifying as a reorganization under section 368(a)(1)(A). Upon completion

of the merger, the separate existence of the taxpayer ceased, leaving [REDACTED] as the surviving corporation. Upon [REDACTED]'s acquisition of [REDACTED] shares, the former stockholders of [REDACTED] owned approximately [REDACTED] percent of all outstanding [REDACTED] common stock.

[REDACTED]'s filing with the Securities and Exchange Commission states that the transaction was accounted for as a reverse acquisition under the purchase method of accounting with New [REDACTED] being deemed the accounting acquirer. [REDACTED] SEC Form [REDACTED] ([REDACTED]).

The information provided does not indicate that any member of the taxpayer's affiliated groups for the taxable year [REDACTED] incurred a dual consolidated loss, as contemplated by section 1503(d). For this reason, our analysis does not consider the effect in identifying the persons to execute consents. We further assume that the taxpayer did not designate another member of the consolidated group for which it was the common parent prior to its merger into [REDACTED], as is contemplated by Treas. Reg. § 1.1502-77(d). Nor have the remaining members of the affiliated group of corporations for which the taxpayer filed the consolidated return for short tax year [REDACTED] designated another member of the consolidated group to act as its agent since that merger, as is further contemplated by Treas. Reg. § 1.1502-77(d).

### ANALYSIS

Generally, section 6501(a) limits assessment of income tax to the period ending three years after the return for that tax period is filed. Under one of the exceptions to this three-year rule, the consent of both the Service and the taxpayer, in writing, to an extension of this period for assessment will extend this period when such an agreement is executed before the expiration of the assessment period. Section 6501(c)(4).

IRM 25.6.22.3 sets forth the notification procedures that the Service must follow on each occasion when the taxpayer is requested to extend the statute by consent. This provision requires that the notification must be made to the taxpayer by sending or presenting Letter 907(DO), and sending or presenting Publication 1035. See IRM 25.6.22.3(2).

Section 6061 provides that any return, statement, or other document made under any internal revenue laws must be signed in accordance with the applicable forms and regulations. The regulations under section 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules

applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Generally, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Where a corporate taxpayer stands as the common parent of an affiliated group of corporations, as defined by section 1504(a), it and the members of the affiliated group may, under certain circumstances, elect to file a consolidated return under section 1501 et seq. With such an election, the common parent becomes the agent for certain actions of the affiliated group.

Under Temp. Treas. Reg. § 1.1502-77T, alternative agents of the affiliated group may act for it where the common parent of the group ceases to be the common parent, regardless of whether the group remains in existence under Treas. Reg. § 1.1502-75(d). Under Treas. Reg. § 1.1502-75(d)(3), if a corporation ("the first corporation") or any member of a group of which the first corporation is the common parent, acquires stock of a second corporation and, as a result, the second corporation would have become a member of the group of which the first corporation is parent, on exchange for stock of the first corporation, AND the stockholders of the second corporation, as a result of owning second corporation stock, own greater than 50 percent of the fair market value of the outstanding stock of the first corporation, then the group of which the first corporation was common parent ceases to exist as of the date of acquisition, and the group of which the second corporation was common parent before the acquisition shall be treated as remaining in existence, with the first corporation becoming the common parent.

By operation of Treas. Reg. § 1.1502-75(d)(3), the [REDACTED] affiliated group continued to exist even after its common parent, [REDACTED], was merged into [REDACTED] and ceased to exist. Treas. Reg. § 1.1502-75(d)(3)(i) (flush language). With its merger into [REDACTED], [REDACTED] was the successor to [REDACTED] as a corporate entity, under state law. Additionally, pursuant to the aforementioned regulation, [REDACTED] was the successor to [REDACTED] as the common parent of the [REDACTED] group. Additionally, since [REDACTED] acquired [REDACTED]'s assets in a transfer to which section 361 applies to allow for nonrecognition of the gain or loss to corporations, and the transfer was in connection with a reorganization described in section 368(a)(1)(A) (i.e., a statutory merger), [REDACTED] s

acquisition of assets fits within a corporate acquisition described in section 381(a)(2).

With the cessation of [REDACTED]'s existence, the temporary regulations identifying alternative agents for statute waivers, among other things, are implicated. Temp. Treas. Reg. § 1.1502-77T(a)(3) deems a waiver of the statute of limitations with respect to the affiliated group that is given by any of the alternative agents identified in Temp. Treas. Reg. § 1.1502-77T(a)(4) to be a waiver given by the agent of the group. That regulation provides four alternative agents, two of which appear to apply in this instance.

Under Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii), a successor to the former common parent in a transaction to which section 381(a) applies can give consent to a statute waiver for the affiliated group. Here, [REDACTED], as successor to [REDACTED] in a merger under sections 368(a)(1)(A), meets the definition of such a successor, inasmuch as section 381(a)(2) applies to a nonrecognition transaction in connection with a 368(a)(1)(A) reorganization such as this. Thus, [REDACTED] can give consent to extend the statute of limitations for the [REDACTED] group as an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii).

Further, under Temp. Treas. Reg. 1.1502-77T(a)(4)(iv), if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the waiver is given may act as an alternative agent. Because the former [REDACTED] shareholders own more than [REDACTED] percent of [REDACTED] stock after the merger, the [REDACTED] affiliated group survives the merger, and [REDACTED], as the new common parent of the group, may act to extend the statute for [REDACTED] group, as an alternative agent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(iv).

We recommend that you submit the consents to one of the authorized officers of [REDACTED], identifying the taxpayer on the Form 872-I as "[REDACTED] Inc. (EIN [REDACTED])", as alternative agent under Treas. Reg. § 1.1502-77T for the [REDACTED] Inc. (EIN [REDACTED]) and Subsidiaries consolidated group.\*"

Put an asterisk after the word "group" and another asterisk at the bottom of the Form 872-I, followed by "This is with respect to the consolidated federal income tax of [REDACTED] Inc. (EIN [REDACTED]) and Subsidiaries consolidated group for the group's short taxable year beginning [REDACTED], and ended [REDACTED]."

Please do not hesitate to contact the undersigned if you need further assistance concerning this matter, at (303) 844-2214, ext. 259.

BERNARD B. NELSON  
Area Counsel  
(Natural Resources:Houston)

By: Will. R. Davis, Jr.  
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